WISCONSIN SUPREME COURT CALENDAR
AND CASE SYNOPSES
OCTOBER 2005

This calendar contains cases that originated in the following counties:
Dane
Green
Green Lake
Kenosha
Milwaukee
Rock
Sauk
Winnebago

These cases will be heard in the Supreme Court Hearing Room, 231 E. Capitol:

THURSDAY, OCTOBER 6, 2005

9:45 a.m.	04AP767	Robin K. v. Lamanda M.
10:45 a.m.	02AP1056	State v. Shawn D. Schulpius
1:30 p.m.	03AP2245	Daniel Steinbach v. Green Lake Sanitary District

FRIDAY, OCTOBER 7, 2005

9:45 a.m.	{03AP1732	Gloria C. Pinczkowski v. Milwaukee County
	{03AP2127	Gloria C. Pinczkowski v. Milwaukee County
10:45 a.m.	03AP2316	Connie Anne Shaw v. Greg Leatherberry
1:30 p.m.	03AP2124	OLR v. Alia

TUESDAY, OCTOBER 11, 2005

9:45 a.m.	03AP1806	Metropolitan Ventures, LLC v. GEA Associates
10:45 a.m.	03AP2968-CR	State v. Charles E. Young
1:30 p.m.	04AP1208	State v. Deryl B. Beyer

WEDNESDAY, OCTOBER 12, 2005

9:45 a.m.	04AP548-W	State of Wisconsin ex rel. Marvin Coleman v. Gary R. McCaughtry
10:45 a.m.	04AP1519-CR	State v. Vanessa Brockdorf
1:30 p.m.	03AP1731	Orion Flight Services, Inc. v. Basler Flight Service

In addition to the cases listed above, the court will consider and determine on briefs, without oral argument, the following cases. Background summaries are not available:

03AP2558-D	Office of Lawyer Regulation v. Richard J. Krueger (Oconto)
04AP60-D	Office of Lawyer Regulation v. Charles K. Krombach (Brookfield)

WISCONSIN SUPREME COURT
THURSDAY, OCTOBER 6, 2005
9:45 A.M.

04AP767 Robin K. v. Lamanda M.

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which affirmed an order of the Sauk County Circuit Court, Judge James Evenson presiding.

This case arises from a custody dispute between a parent and a non-parent. The Court will determine the standard to be used in awarding guardianship to a non-parent when a parent objects.

Here is the background: James D.K. was born in October 2000 and has lived most of his life with his great aunt, Robin K. When James was 3, Robin petitioned to become his legal guardian, presenting evidence that she could provide a better environment for James than could James's mother, Lamanda M. The guardian *ad litem* (James's attorney) recommended that the petition be granted because it was in James's best interest.

Lamanda opposed the petition, pointing out that there was no allegation that she was an unfit mother and maintaining that she would not have allowed the boy to live with Robin had she foreseen that Robin would seek legal custody of him.

The trial court expressed concerns about the instability in Lamanda's life, but ultimately denied the petition, noting that the guardianship statute[1] sets forth no guidelines for awarding guardianship to a non-parent over a parent's objections. The judge expressed concern about awarding guardianship in a circumstance where there is no set of conditions that a parent can strive to meet in order to regain custody of the child: "…[T]here is not a set standard by which the parent can act to demand return of the child…." he said. "The guardian, at that point, can simply say, 'no, you never met whatever standards there are and, therefore, you can't have the child back.'"

The Court of Appeals affirmed, citing caselaw[2] that holds that a parent has a constitutional right to the care, custody, and control of his or her child unless:

> …the parent is either unfit or unable to care for the children or there are compelling reasons for awarding custody to a third party. Compelling reasons include abandonment, persistent neglect of parental responsibilities, extended disruption of parental custody, or other similar extraordinary circumstances that would drastically affect the welfare of the child.

In the Supreme Court, Robin points out that many children are being raised by grandparents and other relatives, and that these caregivers will benefit from a clarification of the circumstances under which they may seek guardianship of the child living under their roof.

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[1] Wis. Stat. Ch. 880

[2] Barstad v. Frazier, 118 Wis. 2d 549, 348 N.W.2d 479 (1984)

WISCONSIN SUPREME COURT
THURSDAY, OCTOBER 6, 2005
10:45 A.M.

02AP1056 State v. Shawn D. Schulpius

This is the third time the Wisconsin Supreme Court will hear oral argument in this case. The case was first heard on Dec. 1, 2000, under a different case number. That argument ended up focusing on a procedural issue: whether to allow the State, which brought the case and then filed a motion to dismiss the day prior to oral argument, to dismiss the appeal. The Court – with Justice David Prosser Jr. not participating – reached a tie vote on that question and the case was sent to the Court of Appeals, where it was dismissed. It was eventually resurrected and went through the Court of Appeals and back to the Supreme Court. The Supreme Court again heard oral argument – this time on substantive issues – on Oct. 28, 2004. The Court determined following that hearing that it required more information on several issues before it could make a decision. The Court now has received supplemental briefs and will hear additional oral arguments from the attorneys. This case began in Milwaukee County Circuit Court, where Judges John J. DiMotto and John Franke have handled different parts of it. The case also has been heard in the Wisconsin Court of Appeals, District I (headquartered in Milwaukee).

This case involves a convicted child molester who remained in secure custody for four years in violation of court orders because no suitable community-based facility could be found for him. He is currently held in the Sand Ridge Secure Treatment Center in Mauston. This offender's case was among the first of a number of high-profile cases involving sex offenders who are committed for mental treatment after they have served their prison time and are found suitable for supervised, community-based treatment. Judges order such treatment, but finding communities that are willing to take these offenders has been all but impossible, according to the State. The result is that the offenders remain in locked facilities in violation of court orders. The Supreme Court is expected in this third round of oral argument to focus on three issues:

1. The appropriate remedy for a person who is held in secure custody in violation of an order for supervised release.

2. Whether to issue an order directing either the State or Milwaukee County to create appropriate facilities for sex offenders who have been found appropriate for supervised release.

3. Whether a person who is held in secure custody in violation of a release order is entitled to sue for money damages, and, if so, who the offender would sue and how governmental immunity would factor into such a lawsuit.

Here is the background: Shawn Schulpius was one week shy of 18 when, in December 1991, he pleaded guilty to, and was convicted of, first-degree sexual assault of a four-year-old boy for whom he had been babysitting. In October 1995, just before his

scheduled release, Schulpius was transferred to the Wisconsin Resource Center. After a June 1996 hearing that included testimony on many other molestations by Schulpius, a judge found that Schulpius was a pedophile and committed him to the custody of the Department of Health and Family Services (DHFS).

The following month, Milwaukee County Circuit Court Judge John Franke ordered Schulpius committed to a secure mental facility unless there was an appropriate community facility. He directed DHFS to report back to him on possible facilities anywhere in Wisconsin. DHFS reported that there were none and Schulpius remained in the locked facility.

In October 1997, after conducting one of the annual reviews that are required under the sexual predator law, Franke ordered the State to find a residential treatment facility for Schulpius. The State failed to find one. Then, in November 2000, Franke considered new information about Schulpius's progress and rescinded his release order. By then, however, Schulpius already had petitioned the Court of Appeals. A majority of that court ultimately rejected Schulpius's claim that the delay in finding housing for him violated his constitutional right to due process.

Writing for the majority, Judge Ralph Adam Fine concluded that the State had acted in good faith in trying to locate a home for Schulpius and noted that releasing Schulpius into the community because the government failed to follow Franke's order to find him suitable housing did not make sense. The dissent, written by Judge Charles Schudson, called the supervised release of sexually violent offenders "a charade" because of the lack of suitable housing. "Where government's unconscionable conduct denies due process of law," Schudson wrote, "courts must fashion appropriate remedies."

In 2004, the state Supreme Court heard oral argument in this case and issued an order that said in part:

> This court … determines that the repeated failure of DHFS to place Chapter 980 committees on supervised release in Milwaukee County when so ordered raises serious constitutional and rule of law issues, as such actions represent a failure to comply with applicable state statutes and lawful court orders.

Two weeks after the hearing, the Court issued an order indicating that it required additional information and inviting various parties (the Badger State Sheriffs Association, the Department of Corrections, the Wisconsin Counties Association and more) to file *amicus* briefs. Now, the Court will hear the case again and is expected to issue a decision that will clarify the issues listed above.

WISCONSIN SUPREME COURT
THURSDAY, OCTOBER 6, 2005
1:30 P.M.

03AP2245 Daniel Steinbach v. Green Lake Sanitary District

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which reversed an order of the Green Lake County Circuit Court, Judge W.M. McMonigal presiding.

This case centers on a question of how special assessments are to be levied against condominium developers. The Court's decision in this case is expected to have statewide impact, especially in lake recreation areas.

Here is the background: Sunrise Point is an 18-unit condominium building on Green Lake. In July 2002, the Green Lake Sanitary District – over the objection of the condominium owners – extended sanitary sewer service to the building and to various other lands by installing a pipe that was connected to the condominium building and to the main sewer line. The District assessed two fees on the properties to which the sewer line had been extended. The first, called an "availability assessment" was $4,730 and was assessed on every buildable lot to which the extension made sanitary sewer service available. The second, called a "connection assessment," was levied on each structure actually connected to the sewer system. This assessment was based upon projected wastewater flow from each property. It was set at $5,930 for single-family residences.

The District assessed each condominium unit the full $4,730 availability assessment and the full $5,930 connection assessment, for a total of $10,660 per unit. The owners sued, arguing that they should have been assessed as a single lot rather than as 18 separate lots. They pointed out that the lot on which their building sits is recorded as a single lot in the Register of Deeds Office, and that the District assessed a nearby mobile home park (containing 55 home sites) as a single lot. The District, however, maintained that it appropriately treated the condo owners as owners of single-family residences.

The Sunrise Point owners won in the circuit court, where the judge reasoned that the condos should have been assessed as the mobile home park was. The judge directed the District to reduce the availability assessment on each of the units to $263, $1/18^{th}$ of the original $4,730 assessment. The connection assessment was not modified and the owners have dropped their challenge to that levy.

The District appealed, and the Court of Appeals reversed, reinstating the original assessments on the condo units. The Court of Appeals concluded that the trial court's reasoning was flawed because a mobile home park, regardless of the number of sites, is still one lot, but creation of a condominium building results in a lot being parceled out to individual owners.

Now, the owners have come to the Supreme Court, which will decide how special assessments against condominium owners are to be handled.

WISCONSIN SUPREME COURT
FRIDAY, OCTOBER 7, 2005
9:45 A.M.

{03AP1732 Gloria C. Pinczkowski v. Milwaukee County
{03AP2127 Gloria C. Pinczkowski v. Milwaukee County

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which affirmed two judgments of the Milwaukee County Circuit Court, Judge Michael Guolee presiding.

This case involves the taking of a home by eminent domain (the legal authority to take private property without the consent of the owner) for an airport expansion project in Milwaukee. The Supreme Court is expected to decide several issues related to determining the value of a property that is taken.

Government entities have the authority to acquire property without the consent of the owner. This power is used when the land is needed for public works projects such as highways and railroads. There are three ways in which government can acquire property. First, it can purchase it from an owner who voluntarily sells it, which is called an "arms-length" transaction; second, it can purchase the property under threat of condemnation; and third, in a situation where the owner does not agree to sell, the government can condemn the property by following a process set out in state law.[3]

Here is the background: In 1987, Milwaukee County began planning to expand Mitchell Field. In 1993, the Milwaukee County Board adopted a master plan for the airport that included purchasing properties near the airport. Gloria and Leroy Pinczkowski's two-bedroom, 1,060-square-foot home, which already was in an area that had been zoned for industrial use, was identified as one of the properties to be obtained.

In 1997 or 1998, the county purchased properties located to the north and south of the Pinczkowskis and notified nearby private businesses such as car rental agencies that they would have to move. One of them, the Hertz Corporation, sent a letter to the Pinczkowskis, expressing interest in possibly purchasing their property and suggesting a price of $468,000. Hertz later, however, abandoned its attempt to buy the property.

In 1999, Milwaukee County offered the Pinczkowskis $93,027 for their property. The county also calculated that a comparable replacement home would cost $77,926 and, applying a formula that is set out in state law, the county offered the Pinczkowskis an additional $24,178 in housing replacement costs (the maximum allowed by statute for a housing replacement payment is $25,000). The Pinczkowskis rejected the offer of $93,027 and the county later paid them a total of $350,000 in compensation representing the fair market value of the property. However, the county rescinded its offer of $24,178 in housing replacement costs, reasoning that the increased compensation for the property made the couple ineligible for the housing replacement payment.

The Pinczkowskis sued, challenging the compensation they received for their property and seeking reinstatement of the housing replacement payment. The housing replacement issue was decided on summary judgment against them. Then, a jury trial was held on the issue of valuing the property. Two rulings that went against the Pinczkowskis

[3] Wis. Stat. § 32.05(7)

during the trial are the subject of this appeal. First, the Pinczkowskis sought to introduce evidence of the purchase price paid by the county in 1997 and 1998 for the properties to the north and south of their home. They argued that, because those sales were voluntary, the prices paid for those properties were an indication of the fair market value of their property. The county argued against this, pointing out caselaw that says evidence of sales to a condemning authority as part of a condemnation project are not evidence of fair market value, even if the sales are voluntary. Second, the Pinczkowskis sought to introduce evidence of the letter from Hertz. The county argued against this, maintaining that the Hertz letter was not a formal offer to purchase. The judge barred the Pinczkowskis from introducing their evidence of sales of adjacent properties and the Hertz letter.

The jury ultimately determined the fair market value of the Pinczkowski property to be $300,000 – thereby reducing the earlier award by $50,000. Another $15,000 was deducted due to environmental issues, resulting in a final award of $285,000.

The Pinczkowskis appealed, and a divided Court of Appeals upheld the verdict. Now, in the Supreme Court, the Pinczkowskis argue that the jury should have been permitted to hear the sale prices of adjacent properties because, although the purchaser was the condemning authority, the sales were not made under threat of condemnation. Second, the Pinczkowskis argue that evidence of the amount a private corporation was willing to pay for their property also should have been permitted. They also raise the issue of their eligibility for the housing replacement payment.

The Supreme Court will clarify what evidence is permitted in eminent domain cases where property owners challenge the government’s payment for their property.

WISCONSIN SUPREME COURT
FRIDAY, OCTOBER 7, 2005
10:45 A.M.

03AP2316 Connie Anne Shaw v. Greg Leatherberry

This is a certification from the Wisconsin Court of Appeals, District IV (headquartered in Madison). The Court of Appeals may certify cases that cannot be decided by applying current Wisconsin law. The Wisconsin Supreme Court, as the state's preeminent law-developing court, often accepts such certifications from the Court of Appeals. The case began in Dane County Circuit Court, Judge Gerald C. Nichol presiding.

This case involves an allegation of excessive use of force by police. The Supreme Court is expected to clarify the burden of proof a plaintiff must meet in order to demonstrate that police used excessive force.

Here is the background: Connie A. Shaw was arrested in January 1998. Following the arrest, she was stripped by Dane County sheriff's deputies who later testified that they took this action to protect her because they believed she was suicidal. In November 1998, she filed a lawsuit against three deputies – Greg Leatherberry, Roger L. Finch, and Amy Elve – alleging that they had violated her civil rights.

At trial, the judge instructed the jury to determine whether Shaw had proved her case by "clear and convincing evidence." The jury determined that she had not met this burden, and returned a verdict in favor of the deputies.

There are two different standards of proof that apply in civil actions: (1) preponderance of the evidence and (2) clear and convincing evidence. The 'preponderance' burden is lower than the 'clear and convincing' burden. The 'clear and convincing' standard is also called the middle burden of proof, because it is lower than 'beyond a reasonable doubt' – which applies in criminal matters.

Shaw appealed, arguing that the lower burden – 'preponderance of the evidence' – should have applied because she brought the case under the federal statute. She asserted that the U.S. Supreme Court and other federal courts have applied this lower burden of proof in civil rights cases and she argued that the trial court's failure to apply the lower burden violated the Supremacy Clause of the U.S. Constitution, which says that the U.S. Constitution, federal statutes, and federal treaties are the supreme law of the land, and that state courts are required to uphold them even if state laws conflict with them.

The Court of Appeals certified this case to the Supreme Court, concluding that the Supreme Court was better situated to determine if federal law requires that Wisconsin courts use the lower burden of proof in cases involving allegations of excessive police force brought under federal law.

The Supreme Court will determine the burden of proof that must be met by individuals who bring federal civil rights lawsuits alleging excessive use of police force.

WISCONSIN SUPREME COURT
FRIDAY, OCTOBER 7, 2005
1:30 P.M.

03AP2124 OLR v. Alia

The Wisconsin Supreme Court is responsible for supervising the practice of law in the state and protecting the public from misconduct by lawyers. Lawyers must follow a code of ethics developed by the Court. When there is an allegation that a lawyer has acted unethically, the Supreme Court's Office of Lawyer Regulation investigates and, if warranted, prosecutes the attorney. A referee – a court-appointed attorney or reserve judge – hears the discipline cases and makes recommendations to the Supreme Court.

This case involves Kenosha Atty. Gino Alia, who has been licensed to practice in Wisconsin since 1995. The Office of Lawyer Regulation (OLR) alleges that Alia committed five counts of misconduct and has recommended that his law license be suspended for six months. The referee, on the other hand, after hearing from Alia and the OLR, opted to recommend a 90-day suspension. Now, Alia (who believes the 90-day recommendation is too harsh) and the OLR (which believes 90 days is too lenient) both have appealed. The Supreme Court will consider the facts and determine what is appropriate.

Here is the background: These charges arose from Alia's representation of a man who had purchased a condominium from a developer who allegedly told him that a nine-hole golf course would be built on adjacent land. The golf course never materialized, and the buyer sued. In the course of the case, Alia hired an appraiser, Michael Rooney, to assess the value of the condominium. Rooney prepared a report that appraised the condominium with, and without, the nine-hole golf course as of 1999.

During the trial, Alia allegedly altered Rooney's report by whiting out information that was harmful to his client's case. After this came to light, the judge held hearings and, while he ultimately dismissed the lawsuit on its merits, he found that Alia's alleged misconduct was egregious. The judge awarded costs and attorneys fees of $11,618 to the opposing side. Alia's client appealed, and the Court of Appeals affirmed the ruling.

The OLR investigated Alia and filed a five-count complaint against him. The referee heard from both sides and concluded that Alia had altered the appraiser's report during the course of the trial. However, because Alia had no prior discipline problems, had been practicing law for just five years, and was cooperative in the disciplinary process, the referee rejected the OLR's request for a six-month suspension and instead recommended that the Supreme Court suspend his license for 90 days.

In the Supreme Court, the OLR maintains that Alia's alleged tampering with evidence in order to influence a jury trial and attempts to deceive opposing counsel and the judge as his actions came to light merit a more lengthy suspension. Alia, on the other hand, argues that discipline cases that have resulted in suspension have involved far more serious misconduct than what he is accused of. He suggests a reprimand would be appropriate.

WISCONSIN SUPREME COURT
TUESDAY, OCTOBER 11, 2005
9:45 A.M.

03AP1806 Metropolitan Ventures, LLC v. GEA Associates

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which reversed a judgment of the Milwaukee County Circuit Court, Judge Jeffrey A. Kremers presiding.

This case involves a contract dispute over the sale of a business, which also involved the sale of real estate. The Supreme Court is expected to decide whether two legal rules that apply to real estate contracts are applicable to the sale of a business. The legal rules are as follows:

1. A contract is unenforceable if a contingency is so indefinite that it prevents a court from determining if the contingency has been satisfied.

2. A contract is unenforceable if a contingency gives one party unfettered power to determine whether the contingency has been satisfied.

Here is the background: On March 19, 2002, Metropolitan Ventures, LLC, agreed to purchase GEA Associates, a business that owned and operated the German English Academy Building at 1020 N. Broadway and a parking ramp at 311 E. Juneau, both in the City of Milwaukee. The agreement contained a financing contingency that sparked this dispute. It provided that Metropolitan would obtain unconditional financing for 85 percent of the purchase price from a reputable lender and would have an appraisal done. The contract gave Metropolitan 30 days to remove this contingency.

On April 17, 2002 – within the 30 days – Metropolitan sent a letter to GEA removing the financing contingency subject to a few conditions and asked for an extension. GEA granted the extension and Metropolitan then sent a letter indicating it had received financing from a local bank and looked forward to closing the deal.

Then, on May 8, 2002, GEA received a better offer. A group called Steadfast Capital, LLC, made an offer that, according to letter from GEA's managing partner to GEA's limited partners, "significantly exceeds" what Metropolitan offered. The managing partner went on to inform the limited partners that they were not bound to sell to Metropolitan and that the deal with Metropolitan would fall through if enough of the limited partners did not agree to it. The letter also gave the limited partners who already had agreed to the sale an opportunity to revoke that decision.

On May 17, 2002, GEA faxed a letter to Metropolitan saying that the deal was off because the limited partners had not agreed to it. Metropolitan sued, and the trial court ultimately dismissed the claim, finding that the financing terms contained in the contract were too vague to be valid. The judge interpreted the contract under the rules that apply to real estate contracts. He declared the contract void and concluded that, therefore, all other claims by Metropolitan – negligence, interfering with a contract – also were void.

Metropolitan appealed and won. The Court of Appeals concluded that the contract could not be held to the same strict standard as a real estate contract, because a business sale is different in that the buyer might not acquire 100 percent of the business and the value of the business may fluctuate between the time the contract is entered into and the actual closing date. “As a result,” the Court of Appeals wrote, “the business sale buyer is unable to specify in the written contract the same terms and conditions as a buyer of real estate. The business sale presents unique characteristics.”

Now, GEA has come to the Supreme Court, which will clarify the legal rules that apply to contracts for the sale of a business.

WISCONSIN SUPREME COURT
TUESDAY, OCTOBER 11, 2005
10:45 A.M.

03AP2968-CR State v. Charles E. Young

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which affirmed a conviction in Kenosha County Circuit Court, Judge Michael Fisher presiding.

This case involves the arrest of a man who fled a parked car when a police officer approached. The question before the Supreme Court is whether the officer illegally seized the man within the meaning of the Fourth Amendment and, if so, whether the drugs that were found in the man's coat should have been disallowed as evidence at his trial.

Here is the background: At just before midnight on a Saturday night in October 2002, City of Kenosha Police Officer David Alfredson was patrolling in an area of the city where a number of night clubs and taverns operate when he spotted a parked car with Illinois plates and five occupants. He continued his patrol and returned between five and 10 minutes later to find that the people were still in the car. As he later testified, the length of time they were in the car aroused his suspicion that they were drinking or doing drugs. He pulled up nearby, illuminated the car with his squad light, and turned on his flashing lights. Then, a man – later identified as Charles E. Young – stepped out of the back seat of the vehicle and Alfredson ordered him to return to the car. He instead ran toward a nearby house and was trying the door when Alfredson grabbed him. Young slipped out of his coat and threw the coat into the house. Alfredson called for back-up and eventually the man was arrested. The officers retrieved his coat and found what they believed to be a container of marijuana in the pocket.

Young was charged with possession of marijuana, resisting an officer, and obstructing an officer. He pleaded not guilty and made a motion to suppress the drug evidence, arguing that it was the product of an illegal search. The judge denied the motion, concluding that the officer had reasonable cause to detain the vehicle and its occupants. The matter went to trial and a jury found Young guilty on all three counts.

Young appealed and the Court of Appeals upheld the conviction. The Court of Appeals concluded Young could not raise a Fourth Amendment violation because he had not been seized under the meaning of the Fourth Amendment: he did not submit to Alfredson's commands to return to the car. The Court of Appeals based its conclusion on a U.S. Supreme Court case[4] with similar facts: a parked car and a man who fled and tossed out drugs as police approached. In that case, the U.S. court held that the person was not considered seized because he did not submit to police authority and therefore does not have the right to later assert a Fourth Amendment violation. The Court of Appeals expressed deep concern about this caselaw, which the Wisconsin Supreme Court

[4] California v. Hodari D., 499 U.S. 621 (1991)

adopted in a 2001 ruling,[5] suggesting that it undid the right of a person to go on his way if an officer approaches and asks questions:

> [A]fter Hodari D., this supposed right to "go on his way" becomes an empty right because it vests the police with the authority to pursue and detain anew. In short, the person is penalized for legal conduct while the police are rewarded for illegal conduct.

While the Court of Appeals concluded that this U.S. case dictated the ruling in the current case, it urged the state Supreme Court to revisit this question:

> We rarely express our concerns about an opinion we are duty bound to follow, much less a United States Supreme Court opinion, but we question the wisdom and reasoning of Hodari D. for the reasons set forth above.

Now, the state Supreme Court will consider whether Hodari D. should continue to control Fourth Amendment cases in Wisconsin.

[5] State v. Kelsey C.R., 2001 WI 54, 243 Wis. 2d 422, 626 N.W.2d 777

WISCONSIN SUPREME COURT
TUESDAY, OCTOBER 11, 2005
1:30 P.M.

04AP1208 State v. Deryl B. Beyer

This is a certification from the Wisconsin Court of Appeals, District IV (headquartered in Madison). The Court of Appeals may certify cases that cannot be decided by applying current Wisconsin law. The Wisconsin Supreme Court, as the state's preeminent law-developing court, often accepts such certifications from the Court of Appeals. The case began in Green County Circuit Court, Judge Daniel L. LaRocque presiding.

This case centers on the legal rights and remedies available to a person committed under Chapter 980 of the Wisconsin Statutes – the so-called Sexual Predator Law –who is unable to obtain a prompt court hearing as required under the law.

Here is the background: In 1981, Deryl B. Beyer, then 21, was convicted of a sex crime. In November 1999, after serving his sentence, he was committed to the custody of the state Department of Health and Family Services (DHFS) as a sexually violent person. He is currently held in the Sand Ridge Secure Treatment Center in Mauston.

Under state law, when a person is committed for treatment as a sexual predator, s/he must be given periodic mental-health examinations. The first examination is to be conducted within six months of the initial confinement; subsequent exams must be given at least once a year "for the purpose of determining whether the person has made sufficient progress for the court to consider whether the person should be place on supervised release or discharged."

After receiving each report, the DHFS may either:

1. authorize the person to petition for release – in which case the court must conduct a hearing on this petition within 45 days after receiving it; or

2. give the person written notice that the department does not believe release is appropriate, but that s/he has a right to petition the court for discharge. This written notice contains a waiver of rights, which the person signs if s/he opts not to pursue discharge. If the offender does not sign the waiver of rights, the court must set a probable cause hearing. The purpose of this is to determine if a full hearing is warranted into whether the person is still sexually violent. The person has a right to have an attorney present at the probable cause hearing. Unlike option #1, there is no deadline for conducting a hearing on this type of petition.

In this case, the timeline was as follows:

November 1999:	Beyer committed as a sexually violent person
January 2001:	DHFS files first periodic report, 14 months after commitment
March 2002:	DHFS files second periodic report (recommending against discharge)
January 2004:	Beyer receives probable cause hearing, 22 months after report filed

Beyer did not waive his right to a probable cause hearing and, consequently, the March 2002 filing triggered the court's obligation to hold this hearing. As noted, there is no express deadline for such a hearing. After dealing with delays caused by problems with a court-appointed attorney and psychological examiners, the court held the hearing 22 months after DHFS filed the report. The court concluded that probable cause to conduct a release hearing did not exist.

Beyer filed petitions for release based upon both the missed deadline for the first periodic examination and the 22-month wait for a probable cause hearing.

The Court of Appeals, as noted, certified this case to the Supreme Court. The Supreme Court is expected to determine whether a person committed under Chapter 980 has a right to a prompt probable cause hearing, and, if so, what remedy is available to the person who does not receive a prompt hearing. The Court also may revisit the issue of what is to be done when the DHFS misses the six-month deadline for the first examination. In a past case,[6] the Supreme Court concluded that DHFS has a mandatory duty to file timely reports but that release of the offender is not the appropriate remedy when a deadline is missed.

[6] State ex rel. Marberry v. Macht, 2003 WI 79, 262 Wis. 2d 720, 665 N.W.2d 155

WISCONSIN SUPREME COURT
WEDNESDAY, OCTOBER 12, 2005
9:45 A.M.

04AP548-W State of Wisconsin ex rel. Marvin Coleman v. Gary R. McCaughtry

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which denied a request for a writ of habeas corpus *from a man who sought a review of a 1986 conviction. The case originated in Rock County Circuit Court, Judge Edwin C. Dahlberg presiding.*

This case involves application of a legal doctrine known as the Doctrine of Laches, which is similar to the statute of limitations. The Doctrine of Laches (laches is a French word that roughly translates to "negligence") says that, for reasons of fairness to all parties, a person who procrastinates unduly long in asserting a legal right may forego the opportunity to exercise that right. In this case, the Supreme Court will decide if laches may bar a petition for a writ of *habeas corpus*.

Habeas corpus is Latin for "You have the body." A writ of *habeas corpus* is a judicial order forcing law enforcement authorities to produce a prisoner they are holding, and to justify the prisoner's continued confinement. This writ is considered to be a very important safeguard of every individual's freedom.

Here is the background: In December 1985, officers from the Beloit Police Department went to the home of Marvin Coleman's girlfriend, allegedly told her that Coleman – the father of her three children – had committed a heinous crime – and asked to search the residence. She asked if they had a search warrant and they told her they did not, but she consented anyway (she later testified, but police denied this, that she consented under duress). The officers confiscated clothing belonging to Coleman along with firearms, jewelry, and old coins.

Whether the search of the girlfriend's home was legal became an issue in the case that ultimately proceeded against Coleman, who was charged with nine felonies, including first-degree sexual assault, battery, armed robbery, theft, and stealing a car. He pleaded guilty and was convicted. He was 20 years old at the time and was sentenced to 80 years in prison.

Coleman then challenged the convictions, arguing that the evidence gathered from the search of his girlfriend's home should have been suppressed because it was the result of an illegal search. The circuit court, however, concluded that Coleman did not have standing to challenge the search because it was not his home and he was not living there. The court did not address whether the girlfriend's consent to the search was voluntary.

Coleman later appealed for modification of his sentence but that appeal was denied and he took his attorney's advice that further appeals would be futile.

More than a decade later, Coleman – who was still in prison – got married and became financially able to hire an attorney to review the prior attorney's performance. Eventually he filed a petition – called a Knight petition – for a writ of *habeas corpus* in

the Court of Appeals. The petition alleged that his appointed appellate lawyer had been ineffective for failing to pursue an appeal.

The State responded to Coleman's petition in two ways. It said there was insufficient information to evaluate Coleman's allegations and it asserted that Coleman's petition should be barred by laches. Coleman responded that if there was insufficient information from the circuit court with regard to the issue of whether his girlfriend consented to the search, he should be given a new trial. The State, on the other hand, saw the lack of a substantial court record as supporting a finding of laches. The Court of Appeals ultimately concluded that Coleman's 17-year delay in seeking a review of his conviction placed the State at an unfair disadvantage. If Coleman were to prevail on the suppression issue, the court said, the State would have no practical means of retrying him. The court agreed that the Doctrine of Laches applied, and, without conducting a hearing, denied Coleman's petition for a writ of *habeas corpus*.

Coleman now has come to the Supreme Court, where he argues that his right to due process was violated when the Court of Appeals determined that laches barred his appeal without conducting a hearing to ascertain whether he had truly neglected to pursue an appeal earlier or whether there were extenuating circumstances that prevented him from appealing. The Supreme Court will decide if Coleman will be permitted to pursue his appeal.

WISCONSIN SUPREME COURT
WEDNESDAY, OCTOBER 12, 2005
10:45 A.M.

04AP1519-CR State v. Vanessa Brockdorf

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which reversed an order of the Milwaukee County Circuit Court, Judge Frederick C. Rosa presiding.

This case involves a City of Milwaukee police officer and a question of whether an incriminating statement that she gave to investigators who were looking into an alleged police brutality incident must be suppressed from evidence because she allegedly believed she had to answer questions or face losing her job.

Here is the background: On the evening of September 14, 2003, a security guard at a downtown Milwaukee Kohls store detained Gilberto Palacios for shoplifting and called police. Officers Vanessa Brockdorf and Charles Jones Jr. responded to the call and arrested Palacios, whom eyewitnesses later described as yelling, knocking down merchandise, and struggling with the officers. Jones's actions after bringing Palacios outside to the squad car are the subject of this case.

In a story that was supported by eyewitnesses, Palacios told Internal Affairs investigators that Brockdorf drove the squad to a nearby neighborhood, parked and went into a restaurant for take-out food. Jones, meanwhile, pulled Palacios out of the back seat, placed him on the ground, straddled him, and punched him 10-15 times in the head. After Jones returned Palacios to the back seat of the squad, Brockdorf returned and the officers realized that Palacios needed medical attention. They then allegedly hatched a false story to tell their sergeant. They drove back to Kohl's, called the sergeant to the scene, and told him that Palacios had injured himself trying to kick out the windows of the squad. Brockdorf told the sergeant she had not seen any physical confrontation between her partner and the suspect.

A citizen who had observed the beating complained and Internal Affairs investigated. Brockdorf changed her story, admitting that they had taken Palacios away from Kohls and that they had agreed to return to the store and say that the suspect had struggled and injured himself at the scene.

Brockdorf was charged with obstructing an officer and she sought to suppress the statement she gave, arguing that it was involuntary because she had feared that she would lose her job if she did not talk. While she had not been threatened with dismissal, she had been threatened with criminal prosecution, which, she said, made her believe that she could lose her job. The circuit court concluded that caselaw[7] dictates that a statement is involuntary and coerced if it is the result of a choice between self-incrimination and termination. The judge held that, although Brockdorf was not directly threatened with dismissal, she had a valid fear that her job was on the line and therefore her statement could be considered coerced and had to be suppressed.

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[7] Garrity v. New Jersey, 385 U.S. 493 (1967) and Oddsen v. Board of Fire and Police Commissioners, 108 Wis. 2d 143, 321 N.W.2d 161 (1982)

The State appealed, and the Court of Appeals reversed, concluding that the circuit court had applied law from cases that were substantially different than Brockdorf's. The Court of Appeals pointed out that Garrity and Oddsen both involved levels of coercion that were not present in this case.

Now Brockdorf has come to the Supreme Court, where she argues that the Court of Appeals erroneously interpreted the caselaw as only applying in particularly egregious circumstances. She notes that other jurisdictions have interpreted the cases in question as applying in any circumstance in which the defendant has an objectively reasonable belief that his/her job will he lost if s/he does not answer the questions.

The Supreme Court will determine if the law requires suppression of an incriminating statement by a police officer if the officer provided the statement because s/he believed not doing so would result in dismissal.

WISCONSIN SUPREME COURT
WEDNESDAY, OCTOBER 12, 2005
1:30 P.M.

03AP1731 Orion Flight Services, Inc. v. Basler Flight Service

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which reversed an order of the Winnebago County Circuit Court, Judge Thomas J. Gritton presiding.

This case involves a question of whether aviation fuel is motor vehicle fuel under the Wisconsin Unfair Sales Act (USA). The Supreme Court's resolution of this case is expected to have a substantial impact on Wisconsin's aviation industry as approximately 25 airports across the state offer fuel from competing sellers.

The public policy that underlies the USA is described in the statute:

> Wis. Stat. § 100.30(1):
> The practice of selling certain items of merchandise below cost in order to attract patronage is generally a form of deceptive advertising and an unfair method of competition in commerce. Such practice causes commercial dislocations, misleads the consumer, works back against the farmer, directly burdens and obstructs commerce, and diverts business from dealers who maintain a fair price policy.

Here is the background: Both the plaintiff (Orion Flight Services) and the defendant (Basler Flight Service) sell aviation fuel at Wittman Regional Airport in Oshkosh. In 2002 and early 2003, they engaged in a price war that saw the price of aviation fuel, both the type delivered by truck and the type available at the pump, drop from a high of $2.54 to a low of $1.59.

Orion sued Basler, alleging that Basler had begun the price war and was selling fuel at below cost, taking a loss in order to drive Orion out of business and acquire a monopoly on fuel sales at the airport. The circuit court concluded that the USA applied in this case and issued a temporary injunction forcing Basler to sell at marked-up prices.

Basler appealed, and the Court of Appeals lifted the injunction, concluding that the USA was meant to prevent large vendors from driving 'mom-and-pop' businesses out of the marketplace and that the Legislature never intended the statute to apply to the aviation fuel industry.

Now in the Supreme Court, Orion argues that the Court of Appeals in essence rewrote the USA to incorporate a definition of 'motor vehicle fuel' that the Legislature did not intend, and that the court wrongly assumed that pilots do not fly around looking for cheaper fuel as automobile drivers might.

The Supreme Court will determine if the USA applies to sales of aviation fuel.